

Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Son's Quality Food Company

File: B-251304.3

Date: August 9, 1993

Keith L. Baker, Esq., Eckert, Seamans, Cherin & Mellott, for the protester.

Capt. Gerald P. Kohns, and Edwin Richards, Esq., Department of the Army, for the agency.

Susan K. McAuliffe, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Protest by offeror ranked third in line for award of fixed-price requirements contract challenging agency's evaluation of cost proposal submitted by offeror ranked second in line for award, as well as that of the awardee, alleging offeror's unrealistically low cost fails to meet regulatory wage requirements, is denied where agency reasonably reviewed proposal in accordance with solicitation's provision that costs would be evaluated for reasonableness and realism and concluded that since offer slightly exceeded agency's calculation of estimated local minimum labor cost (including the costs of compliance with regulatory wage requirements) (compared to all offers received), offer was realistically priced and offeror could reasonably meet wage requirements.

2. Where protest against intervening offeror in line for award is denied, protest against evaluation of awardee's proposal is dismissed since protester would not be in line for award if allegations were resolved in its favor and, therefore, is not an interested party.

DECISION

Son's Quality Food Company protests the adequacy of the Army's evaluation of cost proposals under request for proposals (RFP) No. DAJB03-92-R-6188, issued by the agency for full food service operation of Army dining facilities in the Republic of Korea. Son's, which submitted the proposal evaluated to be third in line for award under the RFP, protests the Army's price realism analysis of the lower priced proposal evaluated to be second in line for award

(submitted by Pacific Architects and Engineers Incorporated (PAE)) and the awardee's low proposal (submitted by Balantine's South Bay Caterers, Inc.).

We deny Son's protest against the evaluation of PAE's cost proposal. We dismiss the protest of the award to Balantine's on the basis that since the protest of the intervening offeror is denied, Son's is not an interested party to protest the award.

The RFP, which contemplated the award of a fixed-price requirements contract for 1 base year and 4 option years, required offerors to submit cost proposals separate from their technical, management and quality control plan proposals. Section L-10 of the RFP (which set forth instructions to the offerors regarding proposal preparation) advised that, in addition to a cost summary:

"the cost proposal shall include in detail all information related to the estimated costs of performing the effort described in this solicitation. Supporting breakdown must be furnished for each element of cost (to include overhead and G&A pools, payroll-related costs, etc.), consistent with offeror's cost accounting system. Each element of cost shall be fully explained as to how the amounts were computed."

Section M of the RFP, which stated that award would be made to the offeror that submitted the proposal most favorable to the government, provided that price (including evaluation of all option year prices) was worth slightly more than the RFP's stated technical evaluation factors (i.e., contractor experience, manager's qualifications and comprehension of requirements/technical approach) combined. The offerors were notified that cost proposals would be:

"evaluated to determine whether proposed costs are realistic in relation to the solicitation and the technical proposal and to provide an assessment of the reasonableness of the proposed price."

The RFP further provided that:

"[p]roposals which are technically unrealistic or are unrealistically low in price will be deemed reflective of an inherent lack of technical competence or indicative of failure to comprehend the complexity and risks of the proposed contractual requirements and may be grounds for rejection of the proposal."

Section H-14 of the RFP, regarding personnel policies and procedures involving Korean national personnel, stated that

"[t]he Contractor shall comply with the rules and regulations established by [United States Forces Korea (USFK) Regulation] 690-1 and other governing regulations pertaining to the employment of Korean employees."

Of the seven second best and final offers received by the Army, three offerors (Balantine's, PAE and Son's) were rated excellent technically and ranked in line for award according to their proposed prices. Balantine's, which offered the lowest price, was awarded a contract under the RFP on April 15, 1993, at the estimated price of \$2,922,638.35 for each of the base and option years (a total estimated price of \$14,613,191.75).

On April 23, Son's filed its current protest against the award to Balantine's stating that the awardee's low price is unrealistic for the contract requirements and that since the firm's base and option year prices are equal, Balantine's proposal is unbalanced for failure to include step increases in wages (and coordinating increases in benefits) for Korean National employees, as required by USFK Regulation 690-1. Son's also protests the propriety of the contracting officer's affirmative determination of Balantine's responsibility as "so grossly erroneous" to be tantamount to fraud or bad faith. Son's specifically contends that negative information regarding the awardee's financial condition--which was considered by the contracting officer--should have caused the contracting officer to render a negative determination of responsibility for the firm.

By letter of May 11, the Army sought summary dismissal of Son's protest against the award to Balantine's. The Army advised the protester for the first time in its dismissal request that PAE was next in line for award after Balantine's. The Army argues that since Son's original protest fails to challenge the intervening offeror's proposal, Son's is not an interested party to protest the award to Balantine's. In response to the Army's dismissal request, Son's timely supplemented its original protest to include a challenge to the Army's price realism analysis of PAE's proposal. In light of the protester's challenge to the intervening offeror (PAE), we denied the Army's summary dismissal request.

Son's contends that PAE's unrealistically low proposal failed to include in its price the costs of complying with all of the wage requirements of USFK Regulation 690-1. Son's argues that despite PAE's assertions of compliance with the governing labor regulations, the firm's cost

proposal does not contain sufficient detail (as Son's contends its own proposal contains) to show an itemization of certain required costs associated with retaining incumbent Korean (local) personnel without degradation in wages or benefits, the payment of tuition assistance for eligible Korean personnel, annual leave (although PAE's proposal specifically provides for monthly holiday pay for Korean holidays) or sick leave for Korean personnel which Son's states will have to be paid during contract performance under USFK Regulation 690-1.

Son's claims it should receive the award under the RFP as the only one of the three offerors that received excellent technical ratings and also submitted extensive detail regarding its cost breakdowns to allow proper evaluation of the proposal. Son's contends that since the agency excused PAE's lack of sufficient detail in its cost proposal and did not downgrade the firm's technical score to reflect a failure to comprehend the RFP's requirements despite PAE's unrealistically low offer, PAE's proposal was not evaluated in accordance with the RFP's requirements. The protester also specifically challenges the adequacy of the Army's calculation of estimated Korean labor costs by applying a constant 7 percent factor to the agency's estimate of each option year's price to account for annual step increases in wages and benefits; Son's instead argues that the Army was required to calculate its labor cost estimate based upon the exact increase applicable to each individual incumbent employee's wages for each option year (which information was provided with the solicitation in response to offeror requests).

The Army reports that in reviewing the proposals for price realism and reasonableness, offers were first evaluated for compliance with minimum manning requirements of the RFP, were then compared to the results of the agency's calculation of reasonably anticipated Korean labor costs, and finally were compared (for labor and total cost) to the other offers received.¹ The Army found that Balantine's and PAE's proposed Korean labor costs were not "understated" (i.e., the prices were not lower than the government's calculated estimate and in fact exceeded that amount by approximately 7 percent) and both proposals met the RFP's minimum manning requirements, so there was no reason to question the offerors' ability to comply with USFK Regulation 690-1 (including step increases and benefits)

¹Both the agency and the protester use the term "cost realism" and "price realism" interchangeably. Since the RFP contemplated fixed prices, the term "price realism" is appropriate. However, for purposes of our decision, the difference in terminology is not material.

within the prices proposed.² The agency found that the total proposed price of each of the two offers was directly in line with the prices proposed by the remaining five offerors (all of which had been reminded during discussions to review prices for compliance with USFK Regulation 690-1) and were well within the government's total contract cost estimate. Consequently, the agency concluded that the prices offered by these firms were reasonable and realistic in terms of each technical proposal and the RFP. In regard to the price realism analysis of PAE's proposal in particular, the agency also specifically noted that since PAE certified in its proposal that it included "full Korean (local) labor costs," its price was in line with the other offerors, and the firm had extensive service contract experience in Korea (including the management of Korean national employees and compliance with USFK Regulation 690-1), there was no reason to question the firm's understanding of the current required effort; PAE's proposal was found to be "very consistent with government requirements."

Cost realism, which measures the likely cost of performance, ordinarily is a mandatory consideration when a cost-reimbursement contract is involved since the government in general will be obligated to bear the actual cost of performance. This is not a factor in the evaluation of proposals when a fixed-price contract is to be awarded, since the government's liability is fixed and the risk of cost escalation is borne by the contractor. See Culver Health Corp., B-242902, June 10, 1991, 91-1 CPD ¶ 556. However, since the risk of poor performance when a contractor is forced to provide services at little or no profit or with an underestimated workforce is a legitimate concern in evaluating proposals, an agency in its discretion may, as it did here, provide for a realism analysis in the solicitation of fixed-price proposals. Id.; Systems & Processes Eng'g Corp., B-234142, May 10, 1989, 89-1 CPD ¶ 441.

In our opinion, the Army did all that was required in the way of a cost/price analysis under the RFP. The RFP stated that price proposals would be evaluated for realism, but did not specify the manner or degree of analysis to which proposals would be subjected. Contrary to Son's contentions that the agency was required to perform a more in-depth analysis in its calculation of reasonably anticipated Korean labor costs, it is clear from the record that the Army made

²Since a protective order was issued in this case to limit disclosure of proprietary information, including all costs proposed by the unsuccessful offerors, discussion of the proposed costs (including PAE's costs) is necessarily limited in detail in this decision.

a meaningful effort to formulate an accurate estimate. Army contracting officials prepared a relatively detailed cost estimate for the Korean labor services required over the life of the contract including option periods. The estimate was prepared for evaluation purposes by the contracting officer after close evaluation of one offeror's extensively detailed cost proposal. The agency's labor cost estimates used in the evaluation were derived after the contracting officer adjusted that offer's prices slightly, for evaluation purposes only, to reflect the government's approximation of the costs of various elements as well as the overall cost to the government. Offerors' proposals were compared to that estimate. Finally, each price proposal was compared to the other price proposals in an effort to determine that prices were fair and reasonable.

We have no reason to question the reasonableness of the above analysis conducted by the Army or to find it inconsistent with the RFP's evaluation scheme. Here, in accordance with the RFP, the Army evaluated the realism of the offerors' proposed prices. This analysis included an evaluation of the extent to which each offeror's proposed price was consistent with the various elements of the technical proposal, indicated a clear understanding of solicitation requirements, and reflected a sound approach to satisfying those requirements.

More specifically, despite the protester's contentions otherwise, the RFP did not require the Army to evaluate the proposals for complete compliance with every provision of USFK Regulation 690-1 (or to formulate its labor cost estimate based on each incumbent employee's specific wage or benefit increases in the option years). The contracting officer here performed a limited, yet reasonable, cost analysis of the proposed labor costs by computing the general anticipated minimum costs for contractor compliance with the governing regulations (including USFK Regulation 690-1) and comparing that amount to the cost proposals received to ensure that all proposals which met the manning requirements surpassed the agency's calculation of estimated labor costs and thus could reasonably be performed within the offered prices. The offered prices (i.e., for labor and total costs) were found to be realistic since they met and surpassed the minimum cost of compliance, yet they did not substantially exceed the government's estimate. Finally, the price proposals received were relatively close in price, providing additional assurance of total price reasonableness.

The record shows, and Son's does not dispute, that PAE's proposal was rated excellent technically, met all manning requirements, and demonstrated a clear understanding of contract requirements. The RFP and the resulting contract

(which by the terms of the RFP does not encompass the contractor's cost breakdowns) clearly require that the contractor shall comply with USFK Regulation 690-1 in the performance of the contract. Although Son's contends PAE's price is unrealistically low and specifically challenges whether PAE will be able to meet the contract's Korean labor cost requirements at its offered total Korean labor price, the record shows that PAE--which if awarded the contract, would bear the risk of the alleged additional costs necessary to meet the RFP's Korean labor requirements--was considered a responsible firm and proposed a price for total Korean labor costs that is in line with the agency's estimate and a total contract price that is in line with the other offers. See Bobnreen Consultants, Inc., B-218214.4, Sept. 27, 1985, 85-2 CPD ¶ 558.

In sum, based on its review of the offerors' price breakdowns and total costs compared to the government's independent calculation of local labor costs and the other offerors' prices, we believe the Army reasonably evaluated PAE's cost proposal as realistic and reasonable, consistent with the RFP's evaluation factors. See PHP Healthcare Corp., Sisters of Charity of the Incarnate Word, B-251799 et al., May 4, 1993, 93-1 CPD ¶ 366; Aumann, Inc., B-245898.3; B-245898.4, July 22, 1992, 92-2 CPD ¶ 35.


Accordingly, Son's protest of the Army's evaluation of PAE's cost proposal is denied.

In its protest, specifically in its comments in response to the agency's report, Son's argued that the Army failed to properly evaluate Balantine's cost proposal and improperly determined the firm was responsible for purposes of award. In light of our denial of Son's protest of the agency's evaluation of the intervening offer, we will not consider these grounds of protest because the protester is not an interested party to protest the award to Balantine's.

Under the Competition in Contracting Act of 1984 and our Bid Protest Regulations, a protester must qualify as an interested party before its protest may be considered by our Office. See 31 U.S.C. § 3553 (1988); 4 C.F.R. § 21.1(a) (1993). That is, a protester must have a direct economic interest which would be affected by the award of a contract or the failure to award a contract. 31 U.S.C. § 3551(2); 4 C.F.R. § 21.0(a). Here, Son's proposal offered the highest price of three excellent proposals and was ranked third in line for award. As we have denied Son's protest of the agency's evaluation of PAE's cost proposal, the protester would not be in line for award of this contract even if it were to prevail in its protest of the award to Balantine's; the offeror second in line for award, PAE, would be in line for award if the protest against Balantine

were sustained. Hence, Son's is not an interested party eligible to challenge the award under 4 C.F.R. § 21.0(a), and we therefore will not consider this aspect of the protest. See RRRS Enters., Inc., B-241512; B-241512.2, Feb. 12, 1991, 91-1 CPD ¶ 152.

The protest is denied in part and dismissed in part.


for James F. Hinchman
General Counsel